

American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program

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NOTE

AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998: BALANCING ECONOMIC AND LABOR INTERESTS UNDER THE NEW H-1B VISA PROGRAM

Jung S. Hamm

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INTRODUCTION

The H-1B visa¹ is a category of employment-based nonimmigrant visas² that allows skilled aliens in certain "specialty occupations"³ to work in the United States. A potential U.S. employer of an eligible foreign worker must file an H-1B visa petition with the Immigration and Naturalization Service (INS) of the Department of Justice (DOJ)⁴ and also a labor condition application (LCA) with the Employment and Training Administration (ETA) of the Department of Labor (DOL).⁵ H-1B visas are valid for three years and can be extended for an additional three-year period.⁶

The "booming economy, [record-]low unemployment, and a shortage of skilled [domestic] workers"⁷ during the 1990s have dra-

¹ See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994). This provision provides the statutory authority of the H-1B visa program:

(a)(15) The term "immigrant" means every alien except an alien who is within one of the following classes of *nonimmigrant aliens*— . . . (H) an alien (i) . . . (b) subject to [8 U.S.C. § 1182(j)(2) (1994 & Supp. IV 1998)] who is coming *temporarily* to the United States to perform services . . . in a *specialty occupation* described in [8 U.S.C. § 1184(i)(1) (1994)] or as a fashion model, who meets the requirements for the occupation specified in [8 U.S.C. § 1184(i)(2)] or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under [8 U.S.C. § 1182(n)(1)]

. . . .

Id. (emphasis added). This Note focuses exclusively on the H-1B program for "specialty occupations."

² Employment-based nonimmigrant visas authorize foreign workers to come to the United States for "limited duration stays." U.S. COMM'N ON IMMIGRATION REF., BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 76-80 (1997) [hereinafter BECOMING AN AMERICAN] (describing the statutory category of nonimmigrant admissions of foreigners as "limited duration admissions [LDAs]"). According to the U.S. Commission on Immigration Reform, "[t]he term 'nonimmigrants' is misleading as some LDAs entering the United States are really in transition to permanent residence, and other LDAs enter for temporary stays and become permanent residents based on marriage or skills." *Id.* at 76 (footnote omitted). These practices are significant given that "the United States has in the past regularly admitted more temporary workers annually than the number of permanent residents admitted on employment-based visas." Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1191 (1997) (footnote omitted). This Note uses the term "immigration" to include not only the admission of aliens on immigrant visas for permanent residence, but also the admission of aliens on a temporary basis, such as temporary workers with H-1B visas. See *id.* at 1153.

³ 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214.2(h)(4)(ii)-(iii) (2000).

⁴ See 8 C.F.R. § 214.2(h)(2)(i)(A) (describing how a U.S. employer files an H-1B visa petition with the INS); *id.* § 214.2(h)(4)(iii)-(iv) (listing criteria and general documentary requirements for H-1B petitions involving a specialty occupation).

⁵ See 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.730-34 (1998); U.S. COMM'N ON IMMIGRATION REF., LEGAL IMMIGRATION: SETTING PRIORITIES 163-64 (1995) [hereinafter LEGAL IMMIGRATION].

⁶ See 8 C.F.R. § 214.2(h)(15)(ii)(B)(1); LEGAL IMMIGRATION, *supra* note 5, at 164; see also 8 U.S.C. § 1184(g)(4) (limiting the term of authorized admission to six years).

⁷ Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW. 471, 484 (1998).

matically increased U.S. employers' demand for skilled foreign workers. This trend is especially strong in the information technology (IT) and computer industries.⁸ In recent years, the U.S. high-tech industry has become the dominant participant in the H-1B visa program.⁹ Prior to the 1998 congressional amendment of the H-1B program,¹⁰ Congress had capped the annual quota of new H-1B visas at 65,000.¹¹ Because of this limitation, the existing H-1B visa program could no longer meet the high-tech industry's voracious demand for foreign skilled workers. Since 1997, H-1B visas have been oversubscribed:¹² the number of H-1B admissions reached the statutory cap of 65,000 before the end of each fiscal year, and "employers petitioning late in the year would be required to wait [another year] for the admission of approved workers."¹³

Unable to fulfill the unprecedented needs for skilled workers under the existing H-1B visa program, the high-tech industry actively lobbied Congress to raise the annual cap on the number of H-1B visas granted to foreign workers.¹⁴ However, the congressional effort to

⁸ See, e.g., Ana Mendieta, *U.S. May Hike Number of High-Tech Job Visas*, CHI. SUN-TIMES, Oct. 19, 1998, at 12 ("Today there are more than 300,000 vacancies in information technology positions in the United States.").

⁹ One commentator has nicely captured the rationale of the high-tech industry regarding its support of the H-1B visa program:

To put the point bluntly, American high-tech companies have experienced such rapid growth that they have collectively outpaced the ability of America's educational system to produce a sufficient number of technically knowledgeable workers. The gap between America's besieged educational system and the acute labor needs of high-tech industries creates a situation where American companies feel compelled to hire foreign nationals to fill many strategic, technically demanding positions.

Joseph B. Costello et al., *Ensuring Continued High-Tech Leadership with a Rational Immigration Policy*, in THE DEBATE IN THE UNITED STATES OVER IMMIGRATION 240, 241 (Peter Duignan & Lewis H. Gann eds., 1998); see also Tom Abate, *Oddball Coalition Was the Loser in High-Tech H-1B Struggle*, S.F. CHRON., Sept. 26, 1998, at C1 (noting the importance of the H-1B visa program to the high-tech industry). Tom Abate provides the percentage of H-1B visa applicants listed by occupation in 1997, based on the data from the U.S. Department of Labor:

Computer-related:	44.4%
Physical therapists:	25.9%
Electrical/electronic engineers:	3.1%
Accountants/auditors:	2.5%
College/university faculty:	2.0%
Physicians/surgeons:	1.8%
Other:	20.2%

Id. at C1 tbl.

¹⁰ See *infra* notes 16-18 and accompanying text.

¹¹ See 8 U.S.C. § 1184(g)(1)(A) (1994) (amended 1998).

¹² See Buckley, *supra* note 7, at 484.

¹³ BECOMING AN AMERICAN, *supra* note 2, at 79.

¹⁴ See Carla Marinucci & John Wildermuth, *Silicon Valley CEOs Flex Political Muscle*, S.F. CHRON., Oct. 3, 1998, at A17 (reporting the aggressive lobbying efforts on Capitol Hill by Silicon Valley's Technology Network, a high-tech advocacy group).

raise the annual H-1B visa cap met vigorous opposition from a vocal minority in Congress, labor unions, and the White House.¹⁵ After months of wrangling, the White House and congressional supporters of the new H-1B bill finally reached a compromise in the fall of 1998.¹⁶ On October twenty-first of that year, President Clinton signed into law the compromise bill, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA).¹⁷ The new H-1B visa law nearly doubles the available number of H-1B visas over the next three years—from the current level of 65,000 to 115,000 in 1999 and 2000, and to 107,500 in 2001—before reverting to 65,000 in 2002.¹⁸ The law also addresses concerns over the potentially adverse impact of the H-1B visa program on the domestic workforce and potential abuses of the program by H-1B employers.¹⁹

This Note examines and critiques the congressional amendment to the H-1B visa program under the ACWIA of 1998 and its aftermath. Part I provides background and describes the H-1B visa program prior to the 1998 congressional amendment.²⁰ Part II examines the controversy and debates surrounding the congressional effort to raise the annual H-1B visa cap, the ultimate result of which was the enactment of the ACWIA.²¹ This Note examines the intense debate between ad-

¹⁵ See *infra* notes 69-73 and accompanying text.

¹⁶ See Christi Harlan, *House Approves Liberalization of Visas for High-Tech Workers*, ATLANTA J.-CONST., Sept. 25, 1998, at F2; *White House Fact Sheet on H-1B Visa Agreement*, U.S. NEWSWIRE, Sept. 24, 1998, available at LEXIS, News Library, Wire Service Stories File [hereinafter *White House Fact Sheet*]; Aaron Zitner, *Foreign Worker Bill Approved: House OK's Deal Brokered with White House to Raise Visa Quota for Skilled Labor*, BOSTON GLOBE, Sept. 25, 1998, at C1.

¹⁷ Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. C, tit. IV, § 411(a), 112 Stat. 2681-642 (1998).

¹⁸ See *White House Fact Sheet*, *supra* note 16.

¹⁹ See, e.g., Perkins Coie, *Congress Passes Legislation on Employment of Foreign "High Tech" Workers*, OR. EMPLOYMENT L. LETTER, Feb. 5, 1999, available at LEXIS, News Library, Oregon News Service File (describing labor protection provisions of the new H-1B visa bill, including "no-benching" and equal-benefits rules).

²⁰ For an excellent overview of the rules of the pre-amendment H-1B visa program, see Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States Under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 791-96 (1997). For a more in-depth treatment of the pre-amendment H-1B visa rules, see Steven A. Clark, *H-1B Specialty Workers*, in 30TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE, at 51 (PLI Corporate Law & Practice Course Handbook Series No. B-1021, 1997); Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 881-90 (1998).

²¹ For the legislative history underlying the 1998 congressional amendment of the H-1B visa program, see generally 144 CONG. REC. E2323 (daily ed. Nov. 12, 1998) (statement of Rep. Smith) (arguing that Congress should give the IT industry the benefit of the doubt despite "inconclusive" evidence as to labor shortage); 144 CONG. REC. S12,748-49 (daily ed. Oct. 21, 1998) (statement of Sen. Abraham) (acknowledging that the amendment will be passed and outlining the compromise); 144 CONG. REC. S12,254-56 (daily ed. Oct. 9, 1998) (statement of Sen. Harkin) (explaining objections to the proposed amendment); 144 CONG. REC. S10,877-79 (daily ed. Sept. 24, 1998) (statement of Sen. Abraham) (explaining

vocates and critics of the program over its potential impact on national economic development and the domestic workforce; both views were highly influential in shaping the recent changes to the H-1B visa program. This Part also briefly looks at the aftermath of the ACWIA and the failure of the Act to achieve the original intent of its sponsors. The H-1B visa quota remains oversubscribed and the debate over whether to raise the visa quota again continues on Capitol Hill.

Part III presents a critical analysis of the newly amended H-1B visa program under the ACWIA. Despite some improvement over the previous program, this Note argues that the new H-1B visa program under the ACWIA is inadequate either to meet the needs of national economic interests, or to provide sufficient protection for the domestic workforce. This Note proposes a radical liberalization of the H-1B visa program: elimination of the annual quota of H-1B visas and structural transformation of the federal agencies overseeing the H-1B visa program. The government should shift its focus and resources from the current system of bureaucratic red tape in the visa application processes (e.g., maintaining restrictive visa quotas) to the policing of potential abuses of the program (e.g., potential labor malpractices by employers and visa fraud schemes by overseas body brokers). This Note applies current general immigration-reform proposals to the particular context of employment-based nonimmigrant visa programs such as the H-1B visa program. It suggests liberalizing immigration policy to promote national economic welfare by following the principles of free trade²² and consolidating the enforcement responsibilities of immigration-related labor standards within the DOL.²³

In essence, this Note proposes that we view the H-1B visa program not merely as an immigration policy, but rather as a new paradigm of economic and labor policy. Under the proposed approach, the liber-

the agreement between the White House and the supporters of the amendment); 144 CONG. REC. H8572-73 (daily ed. Sept. 24, 1998) (statement of Rep. Slaughter) (criticizing the compromise process); 144 CONG. REC. H8529-33 (daily ed. Sept. 23, 1998) (statement of Rep. Smith) (offering a substitute amendment to the House); 144 CONG. REC. H6820-23 (daily ed. July 30, 1998) (statement of Rep. Watt) (offering revisions of the proposed amendment to the House); 144 CONG. REC. H6698-02 (daily ed. July 29, 1998) (statement of Rep. Smith) (offering revision of proposed amendment to the House); 144 CONG. REC. S4954-60 (daily ed. May 18, 1998) (statements of Sens. Hatch, Abraham, and Feinstein) (supporting various revisions of the amendment); 144 CONG. REC. S2715-18 (daily ed. Mar. 27, 1998) (statement of Sen. Abraham) (discussing the "serious problems facing the high tech industry"); and 144 CONG. REC. S1508 (daily ed. Mar. 6, 1998) (statement of Sen. Abraham) (proposing original amendment to the Senate).

²² See generally Chang, *supra* note 2 (applying principles of free trade to immigration law and advocating specific liberalizing reforms of immigration policy to promote national economic welfare).

²³ See BECOMING AN AMERICAN, *supra* note 2, at 169-74 (recommending that "all responsibility for enforcement of immigration-related standards for employers be consolidated in the Department of Labor").

alization and optimization of the H-1B program by relaxing various restrictions—in particular the annual visa cap—and the consolidation of supervisory functions of the H-1B program in the DOL²⁴ (as opposed to the current division between the INS and the DOL) would better protect American economic competitiveness and the domestic workforce than the existing H-1B program.²⁵ The liberalization of the program and the consolidation of administrative functions would enhance the flexibility and efficiency of the H-1B program thereby promoting American competitiveness. In addition, the direct, focused supervision of the program by the DOL, with its expertise in labor protection would effectively protect the domestic workforce from potential abuses or adverse impacts of the H-1B program. Current legislative activity appears to be considering this approach in the face of the realization that the current H-1B visa system, even as amended under the 1998 ACWIA, has failed to provide effective protection for the high-tech industry and the domestic workforce.²⁶

I

THE H-1B VISA PROGRAM PRIOR TO THE 1998 CONGRESSIONAL AMENDMENT

As commentators have noted, “[t]he employment of foreign workers as a supplement to the available domestic labor force has been a recurrent public policy issue throughout the history of the United States.”²⁷ On November 29, 1990, President Bush signed the Immigration Act of 1990²⁸ (IMMACT) into law. The new H-1B visa provision²⁹ within IMMACT was the result of congressional efforts to

²⁴ See *id.* (describing various advantages of having the DOL enforce immigration-related standards for employers).

²⁵ See, e.g., Costello et al., *supra* note 9, at 253-55 (arguing that “keeping American high-tech companies globally competitive should be a national priority” and that the United States should pursue a rational immigration policy through the H-1B program to ensure its leadership position in the global high-tech market); Potamianos, *supra* note 20, at 809-10 (concluding that the H-1B visa program is “an economic boon that, at least in the computer industry, allows the United States to remain at the forefront of the global economy”).

²⁶ See *infra* Part II.D.

²⁷ VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 96 (1984). See generally *id.* at 96-127 (presenting the history of the U.S. nonimmigrant labor policy from 1917 to the early 1980s). Briggs views nonimmigrant labor policy not only as a traditional means of overcoming labor shortages, but more importantly in recent years, as a means of reducing illegal immigration. See *id.* at 117-20.

²⁸ Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8, 26, 29 & 42 U.S.C.). Congress subsequently amended IMMACT to add labor-protective measures. See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (codified as amended in scattered sections of 8 U.S.C.).

²⁹ See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994).

increase admissions of foreign skilled workers into the United States.³⁰ According to one commentator, IMMACT and the H-1B visa program marked a "fundamental shift in immigration thinking . . . [due] to the increasingly competitive global environment of the late 1980s."³¹ This legislation indicated that the desire to enhance American competitiveness in the global economy and the need for high-technology skills were driving U.S. "immigration policy toward an economic focus."³²

Although it facilitated the admission of skilled foreign workers into the United States, IMMACT also placed numerous restrictions on the H-1B visa program. IMMACT placed an annual cap of 65,000 on H-1B visas,³³ a number that apparently was "randomly chosen without regard to American businesses' need for or actual use of these visas."³⁴ The restrictions limited the validity of the H-1B visas to three years,³⁵ although they are renewable for an additional three-year period.³⁶

The H-1B visa program allows U.S. employers to hire skilled foreign workers in certain "specialty occupations."³⁷ Under the current rule, a "specialty occupation" is defined as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human

³⁰ See Potamianos, *supra* note 20, at 789; Robert G. Werner, *The New Immigration Act: Impact on the Computer Industry*, COMPUTER LAW., Mar. 1991, at 21, 21; see also LEGAL IMMIGRATION, *supra* note 5, at 5 (noting one of the purposes of the IMMACT was "meeting present and future labor market needs by increasing the proportion admitted for employment-based reasons, giving higher priority to the entry of professionals and highly-skilled persons, and retaining procedures for helping to ensure that foreign workers do not adversely affect employment opportunities for U.S. workers"); MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 143-49 (1994) (describing the legislative history of the Immigration Act of 1990); Charles C. Foster, *The New Immigration Act of 1990: Major Reform of Legal Immigration*, Hous. LAW., Jan./Feb. 1991, at 26 (presenting a general overview of the Immigration Act of 1990).

³¹ Potamianos, *supra* note 20, at 797 (footnotes omitted).

³² *Id.* One commentator noted:

[T]he 1990 Act is a product of political reality—a compromise between the [INS], labor unions, the immigration bar, and an assemblage of different groups with varying philosophies. In a greater sense, though, the 1990 Act, despite its compromises, is a powerful legislative means toward America's aspiration to lead in an age of multinational economic cooperation and trade.

Steven J. Klearman, *Nonimmigrant Business Visas After the Immigration Act of 1990*, 28 GONZ. L. REV. 53, 54 (1992) (footnote omitted).

³³ See 8 U.S.C. § 1184(g)(1)(A) (1994).

One practitioner prophetically stated in 1992 that "[w]hether this new limitation will create a visa backlog and consequently force U.S. employers to wait to employ foreign professionals remains to be seen." Klearman, *supra* note 32, at 57. Less than five years later, demand for H-1B visas outpaced supply, creating a backlog. See *infra* Part II.A.

³⁴ Buckley, *supra* note 7, at 484.

³⁵ See 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) (2000).

³⁶ See 8 U.S.C. § 1184(g)(4) ("In the case of a nonimmigrant described in [8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994)], the period of authorized admission as such a nonimmigrant may not exceed 6 years."); 8 C.F.R. § 214.2(h)(15)(ii)(B)(1).

³⁷ 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214.2(h)(4)(ii)-(iii).

endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.³⁸

In order to qualify as a specialty occupation position, the opening position must meet certain criteria including the requirement of a baccalaureate or higher degree.³⁹

The INS and the DOL currently share responsibility for the administration and supervision of the H-1B visa program.⁴⁰ Prior to filing an H-1B visa petition with the Regional Service Center of the INS,⁴¹ a potential employer of an H-1B worker must first file a labor condition application (LCA) with the regional ETA office of the DOL.⁴² The LCA is the equivalent of a DOL labor attestation, docu-

³⁸ 8 C.F.R. § 214.2(h) (4) (ii).

³⁹ *See id.* § 214.2(h) (4) (iii) (A).

⁴⁰ In addition to the division of supervisory responsibilities for the H-1B program between the INS and the DOL, the Department of Commerce exercises some administrative control over the H-1B visa program through an export control license program. *See* Deanna Hodgkin, *Rule Hurts Hiring of Foreign Tech Workers*, RECORDER, Oct. 19, 1998, at 1. Under the "deemed export" rule, the Department of Commerce "deems exposing citizens of nations perceived to be antagonistic to the United States to technical information to be the same as exporting the company's product" to that nation. *Id.* Before these foreign nationals begin working in sensitive technical positions, employers must pay for an export control license and receive approval from the Department of Commerce, a process that can take six months. *See id.* (reporting unhappiness of the Silicon Valley companies with the "deemed export" rule, and the potential conflict between the Commerce rule and the Equal Employment Opportunity rules).

⁴¹ *See* 8 C.F.R. § 214.2(h) (2) (i) (describing how a U.S. employer files an H-1B visa petition with the INS); *id.* § 214.2(h) (4) (iii)-(iv) (listing criteria and general documentary requirements for H-1B petitions involving a specialty occupation); Clark, *supra* note 20, at 59-74 (detailing substantive requirements for the H-1B visa petition). The INS has wide discretion in deciding whether to grant an H-1B visa. *See* *All Aboard Worldwide Couriers, Inc. v. Attorney Gen.*, 8 F. Supp. 2d 379, 382 (S.D.N.Y. 1998) (rejecting plaintiff's charge that the INS abused its discretion in denying plaintiff's H-1B visa).

⁴² *See* 20 C.F.R. § 655.730 (1998). The statutory provision on the LCA requires that:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least—

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application—

menting actual or prevailing wages,⁴³ working conditions,⁴⁴ absence of strikes or lockouts,⁴⁵ and notice of filing the LCA with bargaining representatives of the employees⁴⁶ in the workplace of an H-1B worker. The Wage and Hour Division of the DOL is responsible for investigating and enforcing matters related to the LCA program.⁴⁷

The LCA program requires that employers pay H-1B foreign professionals "no less than the greater of . . . [t]he *actual wage* paid to the employer's other employees at the worksite with similar experience and qualifications . . . or . . . [t]he *prevailing wage* level for the occupational classification in the area [of] intended employment."⁴⁸ The DOL regulations provide methods to determine the actual wage⁴⁹ and the prevailing wage⁵⁰ for H-1B workers.

In addition to the wage requirement, potential H-1B employers must certify to the DOL that they "will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed,"⁵¹ and that at the time of hiring H-1B workers, "[t]here is not a strike or lockout in the course of a

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

- (D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

8 U.S.C. § 1182(n)(1) (1994 & Supp. IV 1998).

For a discussion of the labor condition application process, see Clark, *supra* note 20, at 74-113; Potamianos, *supra* note 20, at 794-96. Some commentators criticize the labor condition application provision as highly burdensome to employers. See Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 25 INT'L LAW. 995, 1001-11 (1991) ("The 1990 Act dramatically expands the burdens and liabilities on employers who use the H-1B provision to sponsor foreign workers."); Werner, *supra* note 30, at 22; see also National Ass'n of Mfrs. v. United States Dep't of Labor, No. 95-0715, 1996 U.S. Dist. LEXIS 10478, at *1 (D.D.C. July 22, 1996) (challenging under the Administrative Procedures Act certain regulations promulgated by the DOL under the H-1B visa program), *costs and fees proceeding at*, 962 F. Supp. 191 (D.D.C. 1997), *aff'd*, 159 F.3d 597 (D.C. Cir. 1998).

⁴³ See 20 C.F.R. § 655.731; Clark, *supra* note 20, at 79-92.

⁴⁴ See 20 C.F.R. § 655.732.

⁴⁵ See *id.* § 655.733.

⁴⁶ See *id.* § 655.734.

⁴⁷ See *id.* § 655.800; Clark, *supra* note 20, at 118-25.

⁴⁸ 20 C.F.R. § 655.730(d)(1) (emphasis added).

⁴⁹ See *id.* § 655.731(a)(1); Clark, *supra* note 20, at 89-92; Potamianos, *supra* note 20, at 795-96.

⁵⁰ See 20 C.F.R. § 655.731(a)(2); Clark, *supra* note 20, at 79-89; Potamianos, *supra* note 20, at 795.

⁵¹ 20 C.F.R. § 655.730(d)(2).

labor dispute in the occupational classification at the place of employment."⁵²

II

THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998: CONGRESSIONAL AMENDMENT OF THE H-1B VISA PROGRAM

In formulating the H-1B visa program, Congress recognized the increasing reliance of U.S. businesses on highly skilled foreign professionals.⁵³ This Part of the Note describes how the dramatic increase in demand for foreign skilled workers and the consequent oversubscription of the H-1B visas in recent years forced Congress to address in 1998 the same "tension" that it had to face in 1990 and to arrive again at "a compromise between . . . the [INS], labor unions, the immigration bar, and an assemblage of different groups with varying philosophies."⁵⁴ These factors eventually led to congressional amendment of the H-1B visa program in the fall of 1998, but only after months of political wrangling between supporters and opponents of the H-1B program.

A. The H-1B Visa Cap Crisis: Oversubscription of H-1B Visas

The "booming economy, low unemployment, and[] shortage of skilled workers in recent years"⁵⁵ have caused demand for skilled foreign workers to reach an unprecedented level, especially in the IT and computer industries.⁵⁶ The U.S. high-tech industry has increasingly relied on the H-1B visa program to fill its needs for skilled workers.⁵⁷ As demand for the foreign skilled workers skyrocketed, what had once

⁵² *Id.* § 655.730(d)(3).

⁵³ See Klearman, *supra* note 32, at 65 (noting "Congress clearly intended, through passage of the 1990 Act, to . . . attract[] to the U.S. highly qualified foreign workers" and that "nonimmigrant visas remain useful tools to bring U.S. business the knowledge necessary to lead in an age of multinational economic cooperation and trade").

⁵⁴ *Id.* at 53-54.

⁵⁵ Buckley, *supra* note 7, at 484.

⁵⁶ See 144 CONG. REC. S4955 (daily ed. May 18, 1998) (statement of Sen. Abraham) ("A study by the U.S. Department of Commerce indicates a projected growth of information-technology and high-tech jobs over the next decade of approximately 130,000 per year, [but] we will only be producing [about] 25 percent of the graduates needed to fill these jobs over that timeframe."); see also *Relieving the Skills Squeeze*, DETROIT NEWS, Aug. 9, 1998, at B8 (reporting "ravenous" demand for and severe shortage of highly skilled workers in high-tech industries).

⁵⁷ See Potamianos, *supra* note 20, at 801-06 (asserting that the H-1B visa program plays a vital role in the U.S. computer industry). See generally Edward Wong, *The Streets Are Paved With PC's: Wall Street and Silicon Alley Lure a New Breed of High-Tech Immigrants*, N.Y. TIMES, Aug. 16, 1998, § 14, at 1 (reporting on the lives of high-tech H-1B immigrants in New York City).

been merely the possibility of an H-1B visa backlog became a reality.⁵⁸ In 1997, H-1B admissions reached the annual statutory cap of 65,000⁵⁹ before the end of the fiscal year for the first time.⁶⁰ The oversubscription of H-1B visas forced the INS to announce in August of that year "the formation of a waiting list because approved workers would be ineligible to enter until the start of the next fiscal year."⁶¹ In 1998, H-1B visa admissions reached the cap in May.⁶² Experts projected that admissions would reach the limit even earlier in 1999,⁶³ had Congress not raised the visa cap. Facing severe and widespread shortages of skilled information technology professionals and unable to meet the demand for skilled workers under the existing H-1B visa program,⁶⁴ the high-tech industry began to lobby Congress to raise the annual cap on H-1B visa grants to foreign workers.⁶⁵

B. Legislative History of the ACWIA

In early 1998, Republican Senator Spencer Abraham of Michigan sponsored legislation addressing the issue of the annual H-1B visa cap and the needs of the high-technology labor market; the Senate de-

⁵⁸ See Klearman, *supra* note 32, at 57.

⁵⁹ See 8 U.S.C. § 1184(g)(1)(A) (1994) (amended 1998) ("The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992) . . . under [8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994)] may not exceed 65,000.")

⁶⁰ See Buckley, *supra* note 7, at 484; see also Clark, *supra* note 20, at 57-58 ("[O]n August 29, 1997 [this cap] was finally reached."). October 1 is the beginning of the fiscal year. *Id.*

⁶¹ BECOMING AN AMERICAN, *supra* note 2, at 79.

⁶² See *Relieving the Skills Squeeze*, *supra* note 56, at B8. This article also reports that: America's booming economy has created millions of jobs during the past six years, but it also has stimulated ravenous demand for highly skilled workers. Yet . . . our educational system isn't pumping out enough graduates to slake the thirst for high-tech industries. This forces many bosses to face a tough choice: Import talent or do without. That quandary became academic on May 8, when the United States hit its annual limit of 65,000 professional immigrant workers.

Id.

⁶³ See Timothy Burn, *High-Tech Firms Defend Pursuit of Foreign Workers: Some See Losses for U.S. Citizens*, WASH. TIMES, Oct. 12, 1998, at D14 ("[M]any recruiters predict the annual quota of 65,000 temporary work visas, known as H-1Bs, would be reached by December [1998] without any changes in the law."). Even after nearly doubling the H-1B visa quota under the ACWIA, the H-1B visa cap was nevertheless reached in June 1999. See *infra* note 101 and accompanying text.

⁶⁴ See Burn, *supra* note 63, at D14 (quoting one estimate of a shortage of 340,000 qualified high-tech workers).

⁶⁵ See *id.* at D14 (noting that "the heaviest lobbying for the bill came from Silicon Valley"); Marinucci & Wildermuth, *supra* note 14, at A17 (describing aggressive lobbying efforts on Capitol Hill by Silicon Valley's Technology Network, a high-tech advocacy group).

bated the matter in early 1998.⁶⁶ The Senate, with little opposition,⁶⁷ passed the American Competitiveness Act raising the annual cap on H-1B visas.⁶⁸ However, the attempt to raise the H-1B visa cap met strong opposition in the House of Representatives from traditionally pro-labor Democrats⁶⁹ and anti-immigration Republicans.⁷⁰ These legislators received the backing of labor unions⁷¹ and professional engineering organizations such as the Institute of Electrical and Electronics Engineers-USA (IEEE-USA).⁷² The opposition to the proposal to raise the H-1B visa cap transcended traditional party lines, forming an "odd coalition of liberal, pro-labor Democrats and conservative, anti-immigration Republicans."⁷³ Under pressure from labor unions and pro-labor Democrats, the White House initially opposed the new H-1B visa bill due to concerns over the perceived inadequacy of the

⁶⁶ See 144 CONG. REC. S12,748 (daily ed. Oct. 21, 1998) (statement of Sen. Abraham) (noting that the Senate Judiciary Committee first held hearings on high-tech labor market needs in February 1998).

⁶⁷ See generally 144 CONG. REC. S4954-61 (daily ed. May 18, 1998) (detailing the Senate debate over raising the annual H-1B visa cap).

⁶⁸ See S. 1723, 105th Cong. § 3 (1998).

⁶⁹ See Christi Harlan, *Visa Vote for Skilled Workers Is Canceled: New Visas Won't Be Available Until Oct. 1, Leaving Gap in Supply*, AUSTIN AM.-STATESMAN, Aug. 7, 1998, at D1 ("[T]he scaled-back version didn't fly with House Democrats, even those whose districts include concentrations of high-tech companies.").

⁷⁰ See, e.g., Patrick Buchanan, Commentary, *Sellout of High-Tech Jobs*, WASH. TIMES, Aug. 19, 1998, at A17 (criticizing the H-1B visa program for transforming the American workplace into the "Asian environment," and the Silicon Valley companies for failing to "Americaniz[e]" their labor force).

Republicans are deeply divided on the issue of the H-1B visa program. See, e.g., Spencer Abraham & David McIntosh, Commentary, *Why America Needs Temporary Foreign Workers*, WASH. TIMES, Sept. 1, 1998, at A16 ("On this issue [of H-1B visas], Pat Buchanan . . . [is] wrong, and America's innovators are right."); William Branigin, *House Sets Aside Bill to Allow Hiring of More Foreign Workers: Measure Sought by High-Tech Firms Had Split GOP*, WASH. POST, Aug. 1, 1998, at A2 (discussing the split among Republicans on the issue of raising the H-1B visa cap).

⁷¹ See William J. Holstein, *Give Us Your Wired, Your Highly Skilled: Tech Firms Are Winning the Battle of the Visas*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 53 (reporting the demands of labor organizations like the Communications Workers of America and the AFL-CIO that "Americans displaced by global competition or downsizings ought to have first priority in taking the high-paying jobs").

⁷² See Jolin R. Remert, Commentary, *Trojan Horse in the Free Labor Market?*, WASH. TIMES, Sept. 26, 1998, at C2 (asserting that the H-1B visa program hurts U.S. engineers); Zitner, *supra* note 16, at C1 (quoting IEEE-USA president John Reinert as stating that "[t]he evidence doesn't suggest that there is a labor shortage, and there is no need to increase the number of visas"). According to IEEE-USA, a report by an outplacement firm showed that high-tech industries have laid off 143,000 workers in 1998, more than any other sector of the economy. See Robert MacMillan, *H-1B Visa Bill Ready for Passage*, NEWSBYTES, Oct. 8, 1998, available at LEXIS, News Library, Wire Service Stories File (reporting IEEE-USA president-elect Paul Kostek's argument that "[i]t's bizarre policy to give the industries laying off the most US workers special access to an expanded foreign guest-worker program").

⁷³ Abate, *supra* note 9, at C1.

job-protection provisions in the original bill.⁷⁴ As the House of Representatives, prepared to consider the bill before the August recess “the White House issued a public veto threat and listed . . . changes it was seeking to the bill.”⁷⁵ After months of wrangling and intense negotiations, the White House and the congressional supporters of the bill finally reached a compromise on September 23, 1998, in which they agreed to raise the H-1B visa cap while including additional protective measures for American workers.⁷⁶ The House passed the new compromise H-1B visa bill the next day.⁷⁷ However, the bill faced an unexpected sudden death in the Senate, when a small number of senators led by Democrat Tom Harkin of Iowa blocked the vote.⁷⁸ After a skillful legislative maneuver by its supporters, the H-1B visa bill made a remarkable, eleventh-hour comeback as part of the omnibus appropriations bill.⁷⁹ On October 21, 1998, President Clinton signed

⁷⁴ See Timothy Burn, *Clinton's About-Face on Visas Irks Silicon Valley*, WASH. TIMES, Aug. 6, 1998, at B7; Harlan, *supra* note 69, at D1; Carolyn Lochhead & Tom Abate, *High-Tech Visa Bill Held Up: Clinton Administration Asks for 3 Conditions*, S.F. CHRON., Aug. 1, 1998, at D1.

⁷⁵ 144 CONG. REC. S12,749 (daily ed. Oct. 21, 1998) (statement of Sen. Abraham).

⁷⁶ See 144 CONG. REC. S10,877 (daily ed. Sept. 24, 1998) (statement of Sen. Abraham) (announcing the agreement between the White House and congressional supporters of the new H-1B visa bill); *White House Fact Sheet*, *supra* note 16 (excerpting press release by the White House Press Office on the congressional-White House agreement on H-1B); see also Holstein, *supra* note 71, at 53 (“The issue has forced Clinton to choose which wing of his own party he will cater to—the traditional pro-labor base or the high-tech crowd, many of whom are major contributors. . . . ‘The White House capitulated to industry groups two days before a fund-raising trip to Silicon Valley,’ charged John R. Reinert, president of [IEEE-USA].”).

⁷⁷ See 144 CONG. REC. S12,749 (statement of Sen. Abraham).

⁷⁸ See 144 CONG. REC. S12,256 (daily ed. Oct. 9, 1998) (statement of Sen. Harkin) (urging the Senate to wait another year before raising the H-1B cap in light of recent job cut announcements from the high-tech industry); see also *Bill to Bring Technology Workers to U.S. Dies*, N.Y. TIMES, Oct. 10, 1998, at C2 (reporting the 11th-hour death of the H-1B visa bill); Ashley Dunn, *Plan to Increase High-Tech Work Visas Dies in Senate*, L.A. TIMES, Oct. 10, 1998, at C1 (same); Aaron Zitner, *High-Tech Visa Bill Appears Doomed*, BOSTON GLOBE, Oct. 13, 1998, at D1 (same).

⁷⁹ Congress enacted the new H-1B visa bill, the American Competitiveness and Workforce Improvement Act of 1998, as Title IV of Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. 105-277, §§ 401-18, 112 Stat. 2681-641 to -657 (1998). See Tom Abate & Jon Swartz, *11th-Hour Victory for Tech: Visa Increase, R&D Tax Measure in Budget Bill*, S.F. CHRON., Oct. 16, 1998, at B1 (“In an adroit political move, tech leaders got several of their stalled measures included in the \$500 billion omnibus appropriations bill that was hammered out yesterday between Congress and the White House.”); Mark Leibovich, *High Tech Is King of the Hill: Rash of Legislative Wins Has Industry Celebrating*, WASH. POST, Oct. 16, 1998, at F1 (“[T]echnology lobbyists, executives and congressional supporters managed to attach the bill to the broader budget package.”); see also Matthew Morrissey, *Expansion of Visas for Skilled Workers to Go in Omnibus*, CONGRESS DAILY, Oct. 13, 1998, available at 1998 WL 13131413 (explaining how the H-1B visa bill survived in the Senate). Matthew Morrissey reports that:

Congressional and White House negotiators have decided to add legislation expanding the number of H-1B visas for highly skilled workers to the omnibus appropriations bill [The original version of the bill] passed the

the controversial compromise H-1B visa bill into law: the American Competitiveness and Workforce Improvement Act of 1998.⁸⁰ The INS and the DOL have started implementing the changes in the H-1B visa program under the ACWIA.⁸¹

C. Changes in the H-1B Visa Program Under the ACWIA

The most obvious and controversial change to the H-1B visa program introduced by the ACWIA is the dramatic increase in the number of H-1B visas made available to skilled foreign workers over the three-year period beginning in 1999. The ACWIA increases the annual H-1B visa cap from the 1998 level of 65,000 to 115,000 in 1999 and 2000, and to 107,500 in 2001.⁸² In 2002, the annual H-1B visa cap reverts to 65,000.⁸³

The new law imposes a fee of \$500 for each H-1B visa petition by employers (in addition to the existing filing fee of \$110⁸⁴), from which Congress expects to raise at least \$75 million annually to fund scholarships for underprivileged students in math and science, as well as providing job training for American workers.⁸⁵ Some of the money

House by a 288-133 vote. But Sen. Tom Harkin, D-Iowa, Friday objected to unanimous passage of the bill in the Senate. Because Senate Majority Leader Lott is taking up only bills that can pass by unanimous consent, GOP leaders and the administration today agreed to place the H-1B legislation into the omnibus appropriations bill, which is expected to be the only roll call vote taken by the Senate this week.

Id.

⁸⁰ §§ 401-18, 112 Stat. at 2681-641 to -657; *see also* Alyce C. Katayama & Carolyn P. Kinney, *Increase in Visas Creates Temporary Solution to Worker Shortage*, MILWAUKEE J. SENTINEL, Nov. 2, 1998, at 15 (reporting the President's signing of the new H-1B visa bill).

⁸¹ *See, e.g.*, Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models: Labor Certification Process for Permanent Employment of Aliens in the United States, 64 Fed. Reg. 628 (1999) (to be codified at 20 C.F.R. pts. 655-56) (proposed Dec. 23, 1998) (publishing notice of proposed rulemaking and request for comments by Wage and Hour Division of the Employment Standards Administration in the Department of Labor regarding changes to DOL regulations on the labor condition application of the H-1B program under the American Competitiveness and Workforce Improvement Act of 1998); Petitioning Requirements for the H-1B Nonimmigrant Classification Under Public Law 105-277, 63 Fed. Reg. 65,657 (1998) (to be codified at 8 C.F.R. pts. 103, 214, 299) (proposed Nov. 25, 1998) (publishing interim rule with request for comments by the Immigration and Naturalization Service of the Department of Justice regarding changes to INS regulations on filing fee and filing requirements for the H-1B petition under the American Competitiveness and Workforce Improvement Act of 1998).

⁸² *See* 8 U.S.C. § 1184(g)(1)(A)(i-iv) (Supp. IV 1998); 144 CONG. REC. E2323 (daily ed. Nov. 12, 1998) (statement of Rep. Smith); *White House Fact Sheet*, *supra* note 16; *see also* Coie, *supra* note 19 (listing labor protection provisions in the new H-1B visa bill).

⁸³ *See* 8 U.S.C. § 1184(g)(1)(A)(v); *White House Fact Sheet*, *supra* note 16.

⁸⁴ *See* J. Traci Hong & J. David Swaim, Jr., *Act Doesn't Live Up to Its Name*, TEX. LAW., Jan. 18, 1999, at 26.

⁸⁵ *See White House Fact Sheet*, *supra* note 16.

will also fund the administration and enforcement activities of the DOL under the H-1B visa program.⁸⁶

The ACWIA also provides strict labor protection provisions for domestic and H-1B workers employed by "H-1B dependent" companies.⁸⁷ The Act defines an employer with more than fifty-one full-time employees as "H-1B dependent," if H-1B visa holders account for more than 15 percent of its workforce.⁸⁸ Under the ACWIA, an H-1B dependent employer must attest that (1) "it has not displaced and will not displace a U.S. worker for a period of 180 days, beginning 90 days before the filing of the H-1B petition and ending 90 days after the filing of the H-1B petition;"⁸⁹ (2) that "it will not place the H-1B worker with another employer . . . where there are 'indicia of an employment relationship' between the H-1B worker and the second employer unless it first asks the other employer whether it has or intends to displace a U.S. worker within the 180-day period;"⁹⁰ and (3) that "it has taken good-faith steps to recruit U.S. workers using procedures that meet industrywide standards and offering at least the same wage offered to the H-1B worker."⁹¹ These attestation provisions for the H-1B dependent employers will expire in 2002, when the H-1B visa cap reverts to the pre-amendment level of 65,000.⁹²

The ACWIA increases the fines and debarment period for willful violators of the H-1B program.⁹³ In addition, the new H-1B law provides the DOL with expanded investigatory authority.⁹⁴ The ACWIA also provides whistleblower protection for those employees who cooperate with DOL investigations of potential H-1B violations.⁹⁵

By imposing the "equal-benefits rule"⁹⁶ upon H-1B employers, the ACWIA eliminates "the financial incentive to hire under-compensated foreign temporary workers."⁹⁷ Under this rule, employers "must offer . . . H-1B workers benefits and eligibility for benefits (including participation in health, life, disability, and other insurance plans, re-

⁸⁶ See Coie, *supra* note 19; *White House Fact Sheet*, *supra* note 16.

⁸⁷ See *White House Fact Sheet*, *supra* note 16.

⁸⁸ See *id.* The definition of H-1B dependency is more accommodating for small employers and start-up companies: "A company with one to 25 full-time equivalent employees is considered to be H-1B dependent if it has more than seven H-1B workers. A company with 26 to 50 full-time equivalent employees is considered to be H-1B dependent if it has more than 12 H-1B workers." Hong & Swaim, *supra* note 84, at 26.

⁸⁹ Hong & Swaim, *supra* note 84, at 26.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *id.*

⁹³ See *White House Fact Sheet*, *supra* note 16 (increasing the debarment period from one to two years, and fines from \$1000 to \$5000 per violation).

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ Coie, *supra* note 19.

⁹⁷ *White House Fact Sheet*, *supra* note 16.

tirement and savings plans, bonuses, and stock options) on the same basis, and in accordance with the same criteria, as [similarly-employed] U.S. workers."⁹⁸

Finally, the "no-benching provision"⁹⁹ of the ACWIA obligates employers to pay H-1B workers the full wage stated on the H-1B petition, "even if the worker is in nonproductive status (benched)" due to the employer's decision or due to the worker's lack of the requisite job permit or license.¹⁰⁰

D. Aftermath: The H-1B Visa Cap Crisis Continues

Despite the near-doubling of the annual quota of H-1B visas by the ACWIA, the number of available high-tech visas failed to satiate the demands of the rapidly expanding high-tech industry. In June 1999, more than three months before the end of the fiscal year, the annual allotment of H-1B visas, 115,000 for that year, ran out yet again.¹⁰¹ This marked "the third year in a row that the available visas ran out before the end of the fiscal year."¹⁰² Experts expect that the industry will deplete the allotment of H-1B visas for fiscal year 2000 by the end of January 2000.¹⁰³ High-tech industry executives have already begun complaining that the ACWIA's expansion of the H-1B visa program "was insufficient and warn that the industry faces serious roadblocks unless it gets more foreign workers."¹⁰⁴ As it had done the prior year, the high-tech industry started lobbying Congress to raise the H-1B visa cap¹⁰⁵ and legislators soon introduced several bills on Capitol Hill to increase the number of skilled foreigners allowed to work in the United States. However, these attempts have all met stiff resistance from pro-labor groups,¹⁰⁶ and the Clinton administration has threatened to veto any legislation that raises the H-1B visa cap.¹⁰⁷

⁹⁸ Coie, *supra* note 19.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See William Branigin, *A Push for More Special Work Visas: Tech Employers Say Higher Limit on Foreigners Isn't High Enough*, WASH. POST, June 25, 1999, at A4; see also Stanley Mailman & Stephen Yale-Loehr, *Dealing With the H-1B Visa Cap*, N.Y. L.J., June 28, 1999, at 3 (describing the INS's interim rule in the face of another oversubscription of H-1B visas in 1999).

¹⁰² Branigin, *supra* note 101, at A4.

¹⁰³ See Michael D. Towle, *Passport to the Future: Bills Seek to Raise High-Tech Visas Cap to Meet Worker Shortage*, FORT WORTH STAR-TELEGRAM, Oct. 26, 1999, at 1C.

¹⁰⁴ Branigin, *supra* note 101, at A4.

¹⁰⁵ See Finlay Lewis, *High-Tech Firms Ask Congress to Up Foreign Worker Limits*, SAN DIEGO UNION-TRIB., July 4, 1999, at 11.

¹⁰⁶ See, e.g., Patrick Thibodeau & Stewart Deck, *GOP Eyes Boost in Foreign Workers: Congressional Leaders Want H-1B Vias Cap Raised to 200K to Ease IT Labor Shortage*, COMPUTERWORLD, Aug. 9, 1999, at 1 (noting labor opposition).

¹⁰⁷ See Timothy Burn, *Lawyer Helps High-Tech Firms Find, Retain Foreign Workers*, WASH. TIMES, Nov. 29, 1999, at D19.

Republican Representative David Dreier, the chairman of the House Rules Committee, introduced the New Workers for Economic Growth Act¹⁰⁸ in early August of 1999.¹⁰⁹ His bill and its companion bill in the Senate,¹¹⁰ sponsored by Republican Senator Phil Gramm, would raise the annual H-1B visa quota from the current level of 115,000 to 200,000 between 2000 and 2002.¹¹¹

Representative Zoe Lofgren of California's Silicon Valley¹¹² and Senator Charles Robb of Virginia,¹¹³ both Democrats, introduced a more radical proposal:¹¹⁴ "a new class of immigration visas, the T-Visa, for foreign-born technology workers who have gained degrees on American campuses."¹¹⁵ They propose new, unlimited "Tech-visas" for recent foreign graduates of American graduate programs in science and engineering, who are currently on student visas.¹¹⁶ To qualify for a T-Visa, the foreign applicant must hold a job offer for a position with an annual salary of \$60,000 or more.¹¹⁷ This class of visas would have no annual cap and would allow the worker to remain in the United States for five years.¹¹⁸ Employers of T-Visa foreign workers are liable for \$1000 per visa, which the government would then use to support science, mathematics, and technology education in America's public schools.¹¹⁹

¹⁰⁸ H.R. 2698, 106th Cong. (1999).

¹⁰⁹ See *Foreign Tech-Worker Bill Draws Criticism*, BOSTON GLOBE, Aug. 6, 1999, at C2; Marjorie Valbrun, *Renewed Bids for Visas for High-Tech Workers Reflect the Political Influence of Silicon Valley*, WALL ST. J., Sept. 15, 1999, at A34.

¹¹⁰ See New Workers for Economic Growth Act, S. 1440, 106th Cong. (1999).

¹¹¹ See H.R. 2698 § 101(a); S. 1440 § 101(a); *Foreign Tech-Worker Bill Draws Criticism*, supra note 109, at C2; Valbrun, supra note 109, at A34.

¹¹² See Jim Puzzanghera, *Visas Pushed for High-Tech Workers*, SAN JOSE MERCURY NEWS, Aug. 5, 1999, at C1. Representative Lofgren notes, "[i]t has never made sense to me that, after allowing foreign students to study at our fine American universities, we force some of the best and brightest minds in the world to leave America and relocate to other countries to compete against us." *Id.* According to Lofgren, 60% of the H-1B visa applications on the INS's waiting list are for foreign students in the United States with job offers here. See *id.*

¹¹³ See Cassandra Burrell, *Special High-Tech Visa Proposed*, AUSTIN AM.-STATEMAN, Oct. 22, 1999, at D3. Senator Robb echoed Representative Lofgren's concern about losing skilled foreign graduates of U.S. schools due to visa caps: "[W]e get into a situation where we're losing our seed corn." *Robb Unveils Visa Measure for High Tech Graduates*, CONGRESS DAILY, Sept. 29, 1999, available at 1999 WL 27684993 (alteration in original).

¹¹⁴ See Helping Improve Technology Education and Competitiveness Act ("HITEC Act"), S. 1645, 106th Cong. (1999); Bringing Resources from Academia to the Industry of Our Nation Act ("BRAIN Act"), H.R. 2687, 106th Cong. (1999).

¹¹⁵ Towle, supra note 103, at 1C.

¹¹⁶ See Puzzanghera, supra note 112, at C1; Towle, supra note 103, at 1C. According to Senator Robb, "the pool of such students nationwide is about 17,000." Towle, supra note 103, at 1C.

¹¹⁷ See Puzzanghera, supra note 112, at C1; Towle, supra note 103, at 1C.

¹¹⁸ See Puzzanghera, supra note 112, at C1.

¹¹⁹ See Burrell, supra note 113, at D3.

The high-tech workforce shortage and H-1B visa cap also loom large in the minds of the candidates in the 2000 presidential race.¹²⁰ Among various proposals and comments by the candidates on the issue is an interesting proposal that Senator John McCain made during his unsuccessful campaign for the Republican nomination. In October 1999, Senator McCain, Chairman of the Committee on Commerce, Science, and Transportation, joined the H-1B legislation fray and introduced the 21st Century Technology Resources and Commercial Leadership Act.¹²¹ The bill abandons the H-1B visa quota until 2006; it does not impose any specific cap on H-1B visas, but instead lets market forces control.¹²² Under McCain's proposal, a substantial portion of the current H-1B visa application fee (51.3%) would help fund science and technology education and retraining programs.¹²³

As a latest congressional effort to raise the H-1B visa cap and to amend the program, a bipartisan group of twenty senators introduced a bill, the American Competitiveness in the Twenty-First Century Act of 2000,¹²⁴ in February 2000. The bill would raise the H-1B visa cap by 80,000 for fiscal year 2000, 87,500 for 2001, and 130,000 for 2002.¹²⁵ Furthermore, the bill provides an exemption from the H-1B visa cap for aliens who received graduate degrees from U.S. institutions or work at "an institution of higher education," "a nonprofit research organization," or "a governmental research organization."¹²⁶

Meanwhile, the INS has struggled in the bureaucratic quagmire to implement the ACWIA's expanded H-1B visa program. To its great embarrassment the INS discovered in October 1999 that it had mistakenly exceeded, by as many as 20,000, the annual statutory cap of 115,000 H-1B visas.¹²⁷ According to INS officials, "[t]he error occurred when visa approval numbers from the four INS service centers that process H-1B applications didn't make their way to the agency's main computer system in Washington—which tracks totals."¹²⁸ The INS's latest fiasco—which chairman Lamar Smith of the House Judiciary immigration subcommittee called the "latest self-inflicted wound

¹²⁰ See Jennifer Jones, *Presidential Candidates Weigh in on Technology for Super Tuesday Primaries*, INFOWORLD DAILY NEWS, Feb. 29, 2000, available at 2000 WL 22973948.

¹²¹ S. 1804, 106th Cong. (1999); see *McCain Bill to Maintain U.S. Leadership in Technology Industry*, CONG. PRESS RELEASES, Oct. 27, 1999 (visited Feb. 7, 2000) <<http://www.senate.gov/~mccain/h1B.htm>> [hereinafter *McCain Bill*].

¹²² See *McCain Bill*.

¹²³ See *id.*

¹²⁴ S. 2045, 106th Cong. (1999).

¹²⁵ See *id.* § 2.

¹²⁶ *Id.* § 3.

¹²⁷ See Michelle Mittelstadt, *High-Tech Visa Error Leaves Congress Livid*, AUSTIN AM.-STATESMAN, Oct. 13, 1999, at D1. Later, the INS recanted its admission of an H-1B visa miscount, but stated that it did not know how many visas it issued for fiscal year 1999. See Kim S. Nash, *Feds Backpedal on H-1B Visa Miscount*, COMPUTERWORLD, Oct. 18, 1999, at 94.

¹²⁸ Mittelstadt, *supra* note 127, at D1.

by the agency's inept management"¹²⁹—could not have come at a worse time. News of this error surfaced as the House of Representatives began to hold hearings on bipartisan legislation to dramatically reorganize the INS by splitting it into two distinct agencies within the DOJ.¹³⁰ Officials have not yet decided how to correct the error, but the INS's options include the reduction of the H-1B visa allotment for the fiscal year 2000 by the number of excess 1999 visas or the revocation of the H-1B visas issued after reaching the 1999 statutory cap.¹³¹ Either way it is likely to inflame both the high-tech industry and Congress.¹³²

III

CRITICAL EXAMINATION OF THE ACWIA & A PROPOSAL FOR NEW REFORM

The U.S. Commission on Immigration Reform recommends that "a proper balance must be struck in the [H-1B visa program] between enhancing the productivity and global competitiveness of the U.S. economy through access to foreign workers and protecting U.S. workers against unfair competition."¹³³ The sponsor of the original H-1B visa bill has also stated that the purpose of the ACWIA is to "protect the competitiveness of American business in the global marketplace and improve economic and career opportunities for American citizens."¹³⁴ This Part of the Note argues that despite being an improvement over the previous H-1B visa program, the current program does not adequately meet the goals voiced by the U.S. Commission on Immigration Reform and the bill's sponsor: effective protection of the American competitiveness and of the domestic workforce. This Note proposes an improvement of the H-1B visa program aimed at effectuating these objectives.

A. The H-1B Visa Program as a Tool for Enhancing American Competitiveness

American industry, especially the IT industry, has recently learned the value of the H-1B visa program in global economic and technological competition. H-1B program advocates assert that "the program fills a legitimate need created by shortages of certain skills in the domestic workforce."¹³⁵ In the face of the ever-increasing global-

¹²⁹ *Id.* (quoting Representative Lamar Smith).

¹³⁰ *See id.* For further discussion of recent congressional efforts to reorganize the INS, see *infra* note 177 and accompanying text.

¹³¹ *See* Mittelstadt, *supra* note 127, at D1.

¹³² *See id.*

¹³³ BECOMING AN AMERICAN, *supra* note 2, at 78.

¹³⁴ 144 CONG. REC. S12,748 (daily ed. Oct. 21, 1998) (statement of Sen. Abraham).

¹³⁵ Potamianos, *supra* note 20, at 799.

ization of markets and technology, arguably "[t]he H-1B program is not a domestic work force scourge, but rather an economic boon that . . . allows the United States to remain at the forefront of the global economy."¹³⁶ Therefore, the program ought to maximize its potential economic benefits by increasing its efficiency and flexibility, the ability to easily adapt to the fast changing global economy.

1. *Underutilization of the H-1B Visa Program Under the ACWIA*

Despite its proven usefulness, the current H-1B visa program under the ACWIA still unduly restricts American business from optimally utilizing the program in pursuit of economic competitiveness.¹³⁷ For example, even the U.S. Commission on Immigration Reform, which generally favors more restrictive immigration law, "recognizes that [the annual visa cap or numerical] limitations might reduce the flexibility of businesses in adapting to economic changes."¹³⁸ The ACWIA's temporary increase of annual visa quotas for a limited three-year period does not provide enough flexibility for American businesses in the face of the fast-changing world economy; capping annual H-1B admissions at an arbitrary number does not accord with the unpredictable, fast-paced, and fiercely competitive global high-tech labor markets of the twenty-first century.¹³⁹ As the continuing H-1B visa cap crisis demonstrates,¹⁴⁰ visa caps arbitrarily determined by the legislature fail to accurately predict the needs of industry. No matter how high Congress sets the visa cap, industry will continue to be uncertain about whether it will have a sufficient number of skilled workers in the following year.¹⁴¹ This uncertainty and confusion will inevitably result in high-tech firms moving overseas, closer to the ready source of skilled human capital.¹⁴²

¹³⁶ *Id.* at 810.

¹³⁷ See Katayama & Kinney, *supra* note 80, at 15.

¹³⁸ LEGAL IMMIGRATION, *supra* note 5, at 170.

¹³⁹ The perceived threat of the Year 2000 (Y2K) bug in microchips posing potentially grave threats to computers in large U.S. firms and government agencies might have acted as a catalyst in increasing the demand for foreign IT professionals in recent years. See *New H-1B Visa Rules—The Devil Is in the Details*, BUS. LINE (THE HINDU), Nov. 10, 1998, available at 1998 WL 20731170. The article also points out that:

[T]he provision that the number of visas will revert to the present 65,000 level in 2002, seems to have been tailored to suit the needs of the US with respect to the Y2K bug. . . .

[The] provision in the [new H-1B visa] bill seems to have been conveniently designed to allow [foreign] programmers to be imported for tackling all the "dirty Y2K jobs" and do away with the need for extra programmers once the problem has been solved.

Id.; see also 144 CONG. REC. S4957 (daily ed. May 18, 1998) (statement of Sen. Abraham) (arguing that the increase of the H-1B visa cap is vital to overcome the Y2K problem).

¹⁴⁰ See *supra* Part II.D.

¹⁴¹ See Branigin, *supra* note 101, at A4.

¹⁴² See *infra* note 151 and accompanying text.

Furthermore, commentators refute arguments that only a strict numerical limitation coupled with a restriction on the permissible duration of stay can adequately protect domestic workers and reduce the adverse impact of the H-1B program on the domestic workforce.¹⁴³ One commentator argues:

Placing a numerical limit on the H-1B category limits the U.S. information technology and other business sectors that need access to a global workforce to compete in the international arena. It also fails to recognize that existing laws and regulations which safeguard wages and working conditions can, with proper enforcement, protect U.S. workers from unfair competition.¹⁴⁴

Professor Alan Sykes argues that the current ceiling on the number of temporary worker admissions lacks compelling justification:

Temporary workers are . . . less likely than permanent immigrants to be a net drain on the public sector, given that these workers pay taxes just like anyone else, federal funds cannot be used to provide them with public safety net benefits, and their right to remain in the country generally depends on continuing employment. Further, . . . the likelihood that temporary workers would enter in substantial numbers in competition with unemployed domestic workers seems minimal—other things being equal, employers are likely to prefer an unemployed domestic worker whose skills are more readily verifiable and for whom the transaction costs of obtaining a visa are avoidable.¹⁴⁵

In addition, bureaucratic disincentives and inefficiencies plague the current H-1B visa program and hinder the effective protection of American competitiveness and business interests. One commentator posits that “placing increased bureaucracy and regulation on the process of recruiting H-1B workers can jeopardize the ability of American high-tech companies to meet intense time-to-market pressures for de-

¹⁴³ See, e.g., LEGAL IMMIGRATION, *supra* note 5, at 170 (recommending an examination of the advantages and disadvantages of setting quota and durational limits on nonimmigrant, skill-based admissions). Immigration advocates attending the Immigration Workshop held at the Hoover Institution in October 1996 argued for “increasing the flow of highly skilled workers,” because “immigrants did not take jobs from Americans or create unemployment but instead added wealth to the United States and created jobs and businesses.” Peter Duiguan & L.H. Gann, *Conclusion*, in THE DEBATE IN THE UNITED STATES OVER IMMIGRATION, *supra* note 9, at 257, 257. Other commentators argued that despite some adverse impact due to job competition from imported foreign workers, “negative consequences affected only a few people while most benefited—as they had from free trade—from falling consumer costs and rising productivity, which resulted in job growth.” *Id.* at 258. Some “wondered why we made it so difficult for skilled, talented people to come to the United States.” *Id.*; see also Chang, *supra* note 2, at 1207 (relying on empirical studies to suggest that “immigration has only a weak effect on native wages”) (footnote omitted).

¹⁴⁴ Michael F. Turansick, *Reviewing Past Decade in the Field*, N.Y. L.J., June 14, 1999, at 9.

¹⁴⁵ Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION 158, 189-90 (Warren F. Schwartz ed., 1995) (citations omitted).

living products."¹⁴⁶ Under the newly amended program, potential H-1B employers have to endure burdensome and lengthy application processes in two agencies, submitting the visa petition to the INS and the labor condition application to the DOL.¹⁴⁷ As the INS's recent miscount of the number of H-1B visas issued in 1999 demonstrates,¹⁴⁸ the current inefficiency and incompetency in handling the H-1B program creates uncertainty and confusion for American industry. American businesses desperately need a more efficient and expedited H-1B program in order to remain competitive and adapt to rapid changes in the global market.

The recent H-1B visa cap crisis has accentuated the shift in focus of immigration policy: immigration as a policy tool to support the globalized technology-driven economy. Regardless of nationality, workers skilled in the newest technologies comprise the hottest commodities.¹⁴⁹ The economic benefits of the temporary presence of a large number of highly-educated skilled workers in the U.S. would far outweigh the adverse effects from the potential abuses of the H-1B employers and employees.¹⁵⁰ For example, one possible benefit of a broader H-1B visa program would be the prevention of the flight of domestic high-tech, high-profit-yielding industry overseas.¹⁵¹ Employment-based nonimmigrant visa programs such as the current H-1B program can serve as a valuable and efficient policy device to enhance U.S. business competitiveness in global economic and technological markets.¹⁵²

¹⁴⁶ Costello et al., *supra* note 9, at 251.

¹⁴⁷ See, e.g., Hong & Swaim, *supra* note 84, at 26 (emphasizing that all H-1B employers will be burdened by the various ACWIA restrictions, including the daunting task of "having to calculate and document their non-H-1B dependent status each time they file an H-1B petition").

¹⁴⁸ See *supra* notes 127-32 and accompanying text.

¹⁴⁹ Joseph B. Costello and his cowriters emphasize the crucial importance of skilled workers to high-tech industry:

In the rawest terms, the fate of a high-tech company rests primarily on the technical knowledge of the employees and, by extension, its capacity to garner the best and brightest available for hire. Intel chairman Andy Grove, often quoted in discussions of the issue, says that watching his workers leave the office every day at five o'clock is the scariest moment of his work day. That's when all the company's assets get into a car and drive onto a crowded freeway.

Costello et al., *supra* note 9, at 242-43.

¹⁵⁰ See, e.g., *id.* at 245-46 (arguing that employment-based immigration programs, such as the H-1B visa program, have "fuel[ed] the explosive growth of Silicon Valley companies" by providing "the ability to enlist global talent," and as a result have become "one of the most crucial arteries of high-tech companies").

¹⁵¹ See, e.g., Duignan & Gann, *supra* note 143, at 258 ("If we could not import skilled people because of shortages in the United States, we would have to go offshore, maintained Joseph Costello, CEO of Cadence Design Systems of San Jose.").

¹⁵² See, e.g., Chang, *supra* note 2, at 1149-50 ("[T]he free movement of workers across borders promotes economic welfare by promoting free trade in the labor market. . . .

2. *Proposal for Liberalization of the H-1B Visa Program*

This Note proposes the liberalization of the current H-1B visa program according to Professor Howard Chang's free trade approach to immigration policy.¹⁵³ Following this economic-interest-oriented approach, this Note proposes the complete elimination of the annual numerical cap on H-1B visas¹⁵⁴ and a further simplification of the visa petition process. Reforming the current H-1B visa program according

Indeed, studies suggest that the gains to the world economy from removing immigration barriers could well be enormous and greatly exceed the gains from removing trade barriers.") (footnote omitted).

¹⁵³ Professor Howard F. Chang proposes an elaborate solution to achieve an optimal immigration policy based on free trade principles. *See id.* at 1154-55. Using this economic analysis, he explores the features of an immigration policy and concludes the most advantageous form is that of an immigration tariff. *See id.* According to Professor Chang, "this tariff could take the form of an income tax that discriminates between natives and immigrants," instead of quota or other regulatory restrictions, and that "skilled immigration should be permitted (indeed encouraged) without quantitative or other protectionist restrictions." *Id.* at 1155. Under this analysis, "[i]mmigration restrictions . . . destroy wealth by causing economic distortions . . . [and] prevent employers from hiring foreign workers even if the value that they would produce exceeds the wage that would be paid to the worker." *Id.* at 1159. Chang argues that "[p]rotectionist policies in the immigration context . . . are inappropriate in much the same way that they are inappropriate in the context of international trade in goods." *Id.* at 1208. In essence, he calls for maximizing the total national economic welfare through liberalized immigration policy and enhancing welfare of individual native workers through appropriate fiscal policy. *See id.* at 1243. *But see* JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 337 (1989) ("Contrary to intuition, the theory of the international trade of goods is quite inapplicable to the international movement of persons.").

¹⁵⁴ Total elimination of the H-1B visa quota is not as politically unviable as it first appears. In his speech at the San Francisco Commonwealth Club in August 1999, Senator John McCain pointed to the inadequacy of continual expansion of the quota: "I say that we should eliminate these *artificial* limits altogether, and allow the technology industry's leaders to work with the Department of Labor to set an appropriate level of visas to meet their needs each year." Alex Cukan, *Too Many Immigrants?*, UPI News, Oct. 18, 1999, available at LEXIS, News Library, Wire Service Stories File (emphasis added). Recently, Los Angeles immigration attorney Carl Shusterman presented a similar proposal but limited it to foreign academic, nonprofit, or government researchers. *See INS Runs Out of H-1B Visas, Lawyer Shusterman Suggests Solution*, PR NEWSWIRE, June 15, 1999, available at LEXIS, News Library, News Group File, A11. He argues that the INS already "acknowledges that employers of government and other non-profit researchers are engaged in activities beneficial to society, and [even] exempts them from the customary \$500 H-1B processing fee." *Id.* (quoting Shusterman). Thus, he argues that the INS should treat these workers as a separate category. *Id.* Shusterman's interim solution is ingenious, because the proposal is "far less problematic politically than a raise in the [H-1B visa] cap, while still freeing up a considerable number of visas." *Id.* However, it is still not a long-term solution to the current H-1B problem. For a proposal by Senator Charles Robb and Representative Zoe Lofgren creating a new, unlimited T-visa category for foreign skilled workers educated in U.S. universities, see *supra* Part II.D. For a suggestion that the solution is changing the permanent immigration system, but not the nonimmigrant visa programs such as the H-1B visa program, see James R. Edwards Jr., *Widen the Door for Skilled Foreigners*, CHRISTIAN SCI. MONITOR, Jan. 10, 2000, at 11 (proposing to eliminate the H-1B visa program and shift the immigration system's focus to the education and job skills of potential immigrants).

to free trade principles would provide the requisite flexibility for U.S. companies to compete successfully in the global economy.

Recent proposals to dramatically increase the H-1B visa cap¹⁵⁵ or to create a special class of "Tech" visas with no annual cap for skilled foreign workers educated in the United States¹⁵⁶ would provide a measure of reprieve from the current visa cap crisis. However, like the 1998 ACWIA, these proposals fail to offer a permanent solution and will inevitably lead to another visa cap crisis in the future. The better solution lies in eliminating the root of the crisis—the numerical cap on H-1B visas—and in focusing on the prevention of potential adverse consequences.

The political rhetoric of the debate surrounding the H-1B visa program is probably the biggest obstacle to liberalizing the program. The H-1B program's legislative history since its 1990 enactment under IMMACT has consistently reflected politically popular anti-immigrant, nativist protectionism.¹⁵⁷ However, as the booming high-tech IT industry—the largest employer of H-1B workers—amply illustrates,¹⁵⁸ the employment of skilled foreign workers under the H-1B program has provided a boon to the U.S. economy.¹⁵⁹ Therefore, the liberali-

¹⁵⁵ See *supra* notes 108-11, 120-26 and accompanying text.

¹⁵⁶ See *supra* notes 112-13 and accompanying text; see also note 154 (describing other similar proposals to eliminate the visa cap for a limited class).

¹⁵⁷ See Costello et al., *supra* note 9, at 240-41 ("Ironically, today's heightened public pressure to stave off illegal immigration comes at a time when key sectors of the U.S. economy need to rely more heavily than ever on legal, employment-based immigration. The danger is that negative attitudes about one domain unduly shape negative attitudes about another."); *id.* at 241 ("In a climate hostile to immigration, nativist language can be seductive to politicians running for reelection."); *id.* at 251 ("The xenophobia underlying today's immigration reform movements threatens to erase America's early lead in high tech."); see also Michael D. Patrick, *Nonimmigrant Work Visas; Haitian Relief*, N.Y. L.J., Nov. 23, 1998, at 3 (reporting that the H-1B visa cap debate is not solely about wage or other labor-related issues, but also about "politics as usual [because] political commentators still view immigration as a relatively 'hot button' topic"); cf. 144 CONG. REC. E2323 (daily ed. Nov. 12, 1998) (statement of Rep. Smith) ("[W]hen interpreting the statutory language, each provision should be read in the light most protective of American workers."); SIMON, *supra* note 153, at 310 ("Another difficulty in discussing a guestworker policy is that there is a tendency to consider guestworkers as second-class citizens, and to argue against a guestworker policy because it creates an ethically unacceptable division of classes."); Sykes, *supra* note 145, at 158 ("Much like tariffs and quotas, immigration restrictions are a form of protectionism, insulating domestic workers from competition in the labor market.").

¹⁵⁸ See *supra* note 9.

¹⁵⁹ The H-1B program has undeniably made a significant contribution to the current economic boom of the United States:

[The H-1B program] has allowed the United States computer industry to remain on the forefront of the global computing revolution. . . .

The H-1B program is not a domestic work force scourge, but rather an economic boon that, at least in the computer industry, allows the United States to remain at the forefront of the global economy.

Potamianos, *supra* note 20, at 809-10. Modern high-tech industry has its own special needs for a flexible and efficient H-1B visa program:

zation of the H-1B program does not represent the gratuitous opening of the U.S. border to an influx of wealth-seeking foreigners, but rather comprises a valuable economic policy tool to control and enhance American competitiveness. In this sense, the liberalization of the H-1B program is much like international trade or tourism:¹⁶⁰ that the presence of more foreign goods or foreign tourists in the U.S.—if regulated wisely—can improve the welfare of Americans.¹⁶¹ As one commentator has noted, “[e]veryone thinks about immigration in political terms; it’s time to think about immigration in terms of markets.”¹⁶² Another commentator notes that “[w]hat needs to be capped is nativist xenophobia.”¹⁶³

B. Protection of Labor Interests Under the H-1B Visa Program

The potential adverse effects of the H-1B program on the domestic workforce, such as wage depression, increased unemployment rate, and age discrimination, and possibility of employers abusing the program against vulnerable foreign workers are real and must be taken seriously. This is especially true when one contemplates the complete lifting of the visa cap. The creators of the H-1B visa program have apparently focused more on the *immigration* aspects of the program—the H-1B visa cap—than on the labor-protection mechanisms of the program.¹⁶⁴ This Section of the Note addresses the inadequacy of the labor-protective safeguards in the current H-1B program and proposes a possible solution.

In an industry where employees are far and away the number one asset, high-tech companies need to fill job openings quickly to stay in business. The narrow window of opportunity to market a high-tech product drives the pace at which companies hire. If a company can’t find enough good engineers to turn a concept into a shipping product within a reasonable time frame, another company will likely dominate that market area. . . .

. . . This . . . means competing for a global pool of human resources.

Costello et al., *supra* note 9, at 246.

¹⁶⁰ See BECOMING AN AMERICAN, *supra* note 2, at 76 (“The benefits of a well-regulated system of [limited duration admissions or] LDAs are palpable. LDAs represent a considerable boon to the U.S. economy.”).

¹⁶¹ *But see* ROY BECK, THE CASE AGAINST IMMIGRATION 136-55 (1996) (arguing against the importation of foreign skilled workers on the ground that it harms welfare of the American workforce and the future of American students in technical fields). For diverse views on the impact of immigration in general on the welfare and employment of natives, see generally GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 79-96 (1990) (same); NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 135-253 (1997) (same); SIMON, *supra* note 153 (discussing the economic implications of immigration).

¹⁶² Editorial, *Immigration for Growth*, WALL ST. J., Nov. 5, 1999, at A18 (quoting the spokesman of the National Immigration Forum).

¹⁶³ Editorial, *Capping Nativism*, DETROIT NEWS, Feb. 18, 2000, at A10.

¹⁶⁴ See Timothy Burn, *Smugglers, Criminals Abuse Visa Program: Passes Designed for Skilled Workers*, WASH. TIMES, May 6, 1999, at A1.

1. *Inadequacy of Labor-Protective Safeguards in the ACWIA*

Despite the large potential benefit of the H-1B visa program for the U.S. economy, the program also has proven fertile grounds for potential abuses by H-1B employers against both domestic workforce and foreign IT workers on temporary H-1B visas. Since the inception of the H-1B program, there have been various reports of its abuses. Some abuses of the program—age discrimination by replacing older native workers with a younger (and thus cheaper) foreign skilled workers—are directed against domestic workforce.¹⁶⁵ Others are directed against H-1B foreign workers, exploiting the vulnerability of their temporary visa status.¹⁶⁶

Past reports of abuse by H-1B employers clearly illustrate the need for stronger, more direct supervisory mechanisms within the H-1B program.¹⁶⁷ However, except in the case of H-1B dependent employers, who comprise the minority of H-1B employers, the labor-protective safeguards and enforcement mechanisms are still not adequate under the amended H-1B program.¹⁶⁸ Thus, the potential for employer abuse of the H-1B program remains.

One commentator has argued that the opportunity for H-1B workers to change firms via petition can obviate the possibility of exploitation of the skilled foreign workers by their H-1B employers.¹⁶⁹ As he has argued, “[Y]ou cannot pay foreign-born engineers less. These are smart people, if you try to fool with them, then they will go someplace else.”¹⁷⁰ However, this mere possibility is not a sufficient

¹⁶⁵ See, e.g., Stephanie Neil, *H-1B Safety Net Fails IT Workers*, PC WK., Nov. 16, 1998, at 32 (reporting a particularly egregious case of abuse by a H-1B employer in which a laid-off native IT professional was ordered to train her replacement—a foreign IT professional on a H-1B visa—before leaving the company and arguing that the new H-1B law is still fraught with loopholes for the potential H-1B employers to engage in age discrimination of older native IT workers).

¹⁶⁶ See, e.g., Barb Cole-Gomolski, *The Many Faces of the H-1B Program*, COMPUTERWORLD, Nov. 23, 1998, at 1 (describing contracting companies or “body shops” as the most frequent abusers of the H-1B program, exploiting vulnerable H-1B workers); Miriam Rozen, *Invasion of the Bodyshoppers*, DALLAS OBSERVER, Nov. 12, 1998, at 15 (describing the thriving “body shop” industry in business of subcontracting out the H-1B workers to other companies with huge profit margin at the expense of the H-1B workers).

¹⁶⁷ See, e.g., Alan T. Saracevic, *Landlord Case Highlights Visa Issue: Alleged Misuse of Work Permits Reignites Silicon Valley Controversy*, S.F. EXAMINER, Jan. 23, 2000, at B1 (describing various abuses of the H-1B visa program by both employers and employees and emphasizing the ineffectiveness of the INS’s enforcement mechanism).

¹⁶⁸ See BECOMING AN AMERICAN, *supra* note 2, at 96-102.

¹⁶⁹ See Stuart Anderson, *The Effect of Immigrant Scientists and Engineers on Wages and Employment in High Technology*, in THE DEBATE IN THE UNITED STATES OVER IMMIGRATION, *supra* note 9, at 224, 231 (reporting that “[s]ome companies even ‘raid’ other firms’ H-1B employees, which indicates how competitive the marketplace is for talent in America today”).

¹⁷⁰ *Id.* (quoting a foreign-born engineer who interviews prospective hires) (citation omitted).

justification for inaction; there must be more effective protection for domestic skilled workers potentially affected by the H-1B program.

2. *Proposal for Consolidated Supervision Under the Department of Labor*

This Note proposes a structural reform of the H-1B visa program by consolidating the supervisory function solely within the DOL in order to provide adequate protection to the domestic workforce. The U.S. Commission on Immigration Reform proposed this approach in 1997 in its recommendation on general immigration system reform.¹⁷¹ The Commission recommended the consolidation of all responsibility for enforcing immigration-related employment standards for employers in the Department of Labor, because the DOL is "the best equipped federal agency to regulate and investigate *employer compliance* with standards intended to protect U.S. workers."¹⁷² Congress should immediately implement the Commission's recommendation for the H-1B visa program. This structural reform of the H-1B visa program should not wait for the overall reform of the U.S. immigration system, which might take several years.

Under the proposal, the DOL would handle all aspects of the H-1B petition and supervision process. The DOL would process H-1B visa petitions, issue visas, police potential abuses of the program, and examine the need for H-1B workers by industries with alleged domestic labor shortages. This consolidation of supervision of the H-1B visa program in a single agency with extensive experience in labor practices would help balance the growing labor needs of industry against the desire for adequate employment protection for H-1B workers.¹⁷³ Consolidation would require strengthening DOL's supervisory and policing powers and increasing funding for effective supervision.¹⁷⁴ Additional funding for the H-1B program supervision could derive from additional income taxes levied on H-1B workers.¹⁷⁵ This structural reform would provide incentives to potential H-1B employers to

¹⁷¹ See BECOMING AN AMERICAN, *supra* note 2, at 148-53, 169-74. The Commission further recommended that:

[A]n expedited process is needed for the admission of both temporary and permanent foreign workers . . . as long as adequate safeguards are in place to protect the wages and working conditions of U.S. workers. To prevent abuse of an expedited system, an effective postadmission enforcement scheme is necessary. DOL's other worksite enforcement responsibilities place it in the best position to monitor employers' compliance with the attestations submitted in the admissions process. DOL investigators are experienced in examining employment records and interviewing employees.

Id. at liii-liv.

¹⁷² *Id.* at 169-70.

¹⁷³ See *id.*

¹⁷⁴ See *id.* at 100-01.

¹⁷⁵ See Chang, *supra* note 2, at 1161.

not abuse,¹⁷⁶ while reaping significant benefits from the program and maintaining their competitiveness in the global market.

Recently, Congress began actively pushing for overhauling the INS by splitting it into two distinct agencies within the DOJ.¹⁷⁷ Growing frustration with the INS's inefficiency and incompetency, especially among high-tech industry and other large H-1B employers,¹⁷⁸ will likely accelerate the INS reform movement. However, the potential benefits of having two functionally distinct DOJ immigration agencies to supervise the H-1B program are far from clear. Congress's current INS reform proposal specifically addresses the problem unique to the INS and the immigration system: conflict arising from the INS's current "dual roles of enforcing immigration law and helping immigrants."¹⁷⁹ The inadequacies of the current H-1B visa program should not be viewed as immigration policy issues per se, but economic and labor policy issues requiring a different, sui generis prescription like the one that this Note has offered. This Note proposes that the H-1B visa program be placed outside the traditional immigration system as defined by the current INS, so that agencies responsible for economic and labor policymaking would have more direct control over the program.

¹⁷⁶ Strengthened enforcement power under a consolidated agency would also be effective against the problem of H-1B visa fraud by sham companies. See Burn, *supra* note 164, at A1 (describing the pervasive problem of H-1B visa fraud in India, China, and Russia and the inability of the INS to remedy the problem due to "understaffing, lack of training and a shortage of management").

¹⁷⁷ In July 1999, Republican Representative Harold Rogers introduced a bill, Immigration Reorganization and Improvement Act of 1999, H.R. 2528, 106th Cong., to split the INS into two independent agencies within the DOJ—the Bureau of Immigration Services and the Bureau of Immigration Enforcement. See H.R. 2528; see also Marcus Stern, *Three House Lawmakers Launch Campaign to Reorganize the INS*, SAN DIEGO UNION-TRIB., July 16, 1999, at A10 (reporting the introduction of the bill). Despite wide support at the outset, the INS reorganization bill failed to materialize in the fall of 1999 due to disagreement between the Republican Congress, the Clinton administration, and immigration advocates. See Joe Cantu, *Despite Vows, Politicos Fail to Break Up INS-Well, Maybe Next Year*, SAN DIEGO UNION-TRIB., Nov. 27, 1999, at A1. See generally David A. Martin, *Legislation to Reorganize INS Overlooks Bureaucratic Flaws*, N.J. L.J., Sept. 13, 1999, at 23 (criticizing the recent Republican-led plan to reorganize the INS). In March 2000, House Republicans reintroduced the same bill to split the INS. See Immigration Reorganization and Improvement Act of 1999, H.R. 3918, 106th Cong. (2000). In the face of vigorous opposition by the White House and Democrats in Congress, the fate of this bill remains uncertain. See Dena Bunis, *Politics Stalls Reform of INS*, ORANGE COUNTY REC., Mar. 23, 2000, at A23 ("A House panel passed an INS reform bill that not only has no chance of becoming law, but probably set back efforts to resolve the INS mess."); Sean Scully, *GOP Lawmakers Want INS Divided*, WASH. TIMES, Mar. 23, 2000, at A6 (reporting the opposition to the bill by Democrats and the White House). Nevertheless, "[t]here is a consensus across the board that the INS needs to be fundamentally restructured. . . . The debate is over how." Marisa Taylor, *Talk of Overhauling the INS Has Wide Backing*, FORT WORTH STAR-TELEGRAM, Dec. 5, 1999, at 21 (quoting Frank Sharry, director of an immigrant advocacy group).

¹⁷⁸ See *supra* notes 127-32 and accompanying text.

¹⁷⁹ Taylor, *supra* note 177, at 21.

CONCLUSION

This Note has examined the congressional amendment of the H-1B visa program under the American Competitiveness and Workforce Improvement Act of 1998. Despite some improvements to the H-1B program, the ACWIA only provides temporary stopgap solutions for the protection of American competitiveness and the domestic workforce. In attempting to respond to both the high-tech industry and a pro-labor constituency simultaneously, Congress has achieved in the ACWIA only a short-term political compromise. American business needs a permanent reform of the H-1B visa program that can truly promote national economic interests and protect the domestic workforce.

To improve the current H-1B program, this Note proposes the full liberalization of the H-1B program via the relaxation of various quantitative and qualitative restrictions on the importation of foreign skilled workers, and the consolidation of the supervisory responsibilities for the H-1B program in the DOL. With appropriate labor-protective safeguards in place through a structural reform of the H-1B program, the liberalization of the H-1B program and the removal of various administrative restrictions would effectively protect the national economic interest and the welfare of the domestic workforce. These measures would transform the current H-1B program from a temporary political appeasement of both high-tech industry and labor to a more permanent and valuable economic policy tool. The fully optimized and liberalized H-1B visa program would promote American competitiveness and, by extension, the welfare of all Americans in the twenty-first century.